86-1180

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BERNICE RICHARD,

Petitioner,

– against –

JULIAN SHERRIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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59 pp

QUESTIONS PRESENTED FOR REVIEW

1. Which interpretation of Rule 60(b)(3) of the Federal Rules of Civil Procedure is correct: the majority rule (3rd, 4th, 5th, 7th and 9th Circuits) that fraud committed during trial which plays a material part in influencing a judgment is grounds for setting aside that judgment; or the minority rule (adopted by the 2nd Circuit in this case) that a judgment will be set aside only if fraud would change the entire outcome of the case?

The Court below affirmed the District Court's articulation and application of the minority rule.

2. Should the Supreme Court exercise its power of supervision over the Federal Courts to direct District Courts to discourage fraud, misrepresentation and misconduct by parties toward their adversaries and the trial court?

The courts below did not address this question but made no adverse comment whatsoever toward plaintiff's proven frauds in the trial of this case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bernice Richard petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit affirming denial of petitioner's motion to vacate the judgment of the District Court under Rule 60(b)(3) of the Federal Rules of Civil Procedure, and adopting a restrictive interpretation of that rule which is contrary to the drafter's plain intent and to the cases decided in other circuits, as well as to sound judicial administration.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit, dated October 21, 1986 is unreported (App. A). It affirms the order of the United States District Court for the Southern District of New York dated May 22, 1986 (App. B). An earlier appeal by petitioner (defendant below) from a prior order dated April 27, 1984 (App. F) denying her motion pursuant to Rule 60(b), Fed.R.Civ.P. was affirmed by an order of the United States Court of Appeals for the Second Circuit dated December 3, 1984 (unreported) (App. D). By order of the District Court dated June 22, 1984 (App. E), leave was granted petitioner to conduct additional post-trial discovery and by opinion dated December 19, 1985 (App. C), a hearing on the forged exhibits was ordered by the District Judge.

JURISDICTION

This Petition for Certiorari is from a Judgment of the United States Court of Appeals for the Second Circuit made and filed on October 21, 1986.

PROVISIONS INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure:

Rule 60. Relief from Judgment or Order

> (b) **Mistakes: Inadvertence: Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: *** (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; *** The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. ***

STATEMENT OF THE CASE

This case stands for "bottom-line justice," where anything goes in order to win.

It is precedent for the proposition that a Federal court litigant can with impunity --

1. *Steal* from his prospective partner and *lie* about it under oath at trial (see Item 1, *infra*);

2. Procure *forged* and *false* documents in an attempt to obtain more money from his partner, and use them in support of a preliminary injunction and then as trial exhibits (see Item 2 *infra*); and

3. Obtain yet another *forged* exhibit, after institution of suit, corroborating his *false* trial testimony on three material issues and introduce that as proof at trial (see Item 3, *infra*).

A litigant, according to the decisions below, will never be subject to any sanction whatsoever if he is later found out -- even though a District Judge and Court of Appeals squarely determine that the testimony was false (F-3, D-2) and the exhibits were forged (B-3, A-3).

The Facts

For a brief time, Julian Sherrier and Bernice Richard were lovers. He was a married Londoner, who came to New York to solve his financial distress. She was a wealthy widow, lonely and vulnerable. They met at a charity benefit. He charmed her, made love to her, and headed home with a cash loan of $125,000.

Bernice Richard was a benefactor of the Metropolitan Museum of Art. When Sherrier talked to her of ancient Ghandharan art from the 1st and 2nd centuries which could be obtained at bargain prices in Pakistan she was intrigued. Soon she advanced him funds to make a deposit on an important collection. Sherrier pocketed the money. Then she sent him

more funds to complete a purchase. How much of this he spent for art, and how much he diverted to his own use is the crucial issue on which he offered forged exhibits, half-truths and lies at trial.

Mrs. Richard later testified that four specific purchases of Ghandharan art were for her; that Sherrier was to be compensated by having his expenses paid and the opportunity to make his own purchases along the way. Sherrier, however, claimed the whole episode was a joint venture, that the pieces were owned jointly, and that he had advanced large sums of his own money toward the costs of the specific pieces in suit. He produced "documentation" from the seller to establish the amounts of his payments. These later proved to be forged.

The romance soon cooled, and with it Bernice Richard's fascination with the Pakistan art. When she discovered by sheer chance that Sherrier was stealing the insurance proceeds from a separate piece he had sold her (then arranged to have put up for sale, when it was stolen), she slammed the door shut on him, on their romance, and on their business dealings.

Two years later, Julian Sherrier brought suit against Bernice Richard in the United States District Court for the Southern District of New York, invoking its diversity jurisdiction.

Item 1. During the trial Sherrier told an elaborate story of how he had used the first $50,000 Mrs. Richard had advanced as a deposit by delivering it to a young man in London and receiving it back from the lad's father in Pakistan.

Item 2. Then he produced documents showing that the $50,000 had been used to pay part of the cost of the "joint venture" purchase of Ghandharan statues.

On the motion to set aside the judgment this proof was shown -- and found -- to be false.

The case was tried before the District Judge without a jury. During the trial, Sherrier produced yet another document

(*Item 3*), this time under notarial seal, purporting to corroborate his version of the financial transactions. Trial was expedited at the plaintiff's request. No discovery was ever conducted in Britain or Pakistan. The trial judge found in favor of Sherrier. 564 F.Supp. 448 (S.D.N.Y. 1983)

After the trial, Bernice Richard went to London in disguise. She located the father of the young man to whom the original $50,000 was supposedly given, and he repudiated the story in its entirety. She then travelled on to Pakistan, where the denial was reconfirmed by the son.

Both father and son then came to New York voluntarily where they testified under oath in court-ordered depositions. The District Judge concluded that Sherrier had lied about the initial $50,000 payment in the "joint venture", that Sherrier had actually converted the funds to pay off personal debts. (F-3) The District Judge, however, simply modified the arithmetic in the judgment and let it stand. (F-4)

Mrs. Richard's counsel requested the Court's permission to send letters rogatory to Pakistan to inquire about the authenticity of the documentary exhibits (*Items 2 and 3*). After extended delays caused by Sherrier's refusal to supply addresses for the people he dealt with, the letters were finally sent and returned, providing authentic signatures for the supposed seller of the Ghandharan statues. Forensic experts established that the signatures on the "seller's" documents introduced at trial by Sherrier were forgeries.

The District Court ruled, however, that although these key exhibits were forgeries other evidence supported the judgment he had awarded to Sherrier, and he therefore would not disturb it.

The Court of Appeals affirmed, ruling that the matter rested entirely in the trial judge's discretion.

The Court of Appeals gratuitously added that the motion to vacate based on the forged exhibits was not timely, without ever examining the actual history of Mrs. Richard's continuing pursuit of evidence under District Court supervision to establish the plaintiff's fraud.

The two lower courts concluded, in short, that plaintiff's lies to the finder of fact and his submission of forged motion and trial exhibits was of no moment, and brushed them all aside.

What is most remarkable about these decisions is that not a single word of criticism or rebuke appears anywhere in the opinions of either of the courts below.

Committing perjury and fraud in the Federal courts is acceptable conduct, it appears, so long as the plaintiff can still make out a prima facie case.

REASONS WHY WRIT SHOULD BE GRANTED

Fraud, cheating and lying have no place in the halls of justice.

When a litigant comes into Federal court with a premeditated plan to lie and use false exhibits he should forfeit his right to Federal jurisprudence when he is found out.

The District Judge sidestepped the issue by saying that the false evidence did not matter -- that he would have decided the same way anyway. The Court of Appeals ducked the question by saying it was completely up to the District Judge.

Now it is for the Supreme Court to declare that it *does* matter whether litigants who invoke Federal jurisdiction lie and cheat, whatever the effect may be on the outcome.

It matters to *public confidence* in the courts. And it matters to the *standards of Federal jurisprudence.*

Specific Legal Issues to Be Addressed

This case presents a fundamental question of the meaning of Rule 60(b)(3) of the Federal Rules of Civil Procedure. What does that rule mean when it says that a court may vacate a judgment for "fraud . . . , misrepresentation or other misconduct of an adverse party"? Is material fraud, misrepresentation and misconduct acceptable if the District Court sustains the judgment on other grounds? The Second Circuit says "Yes". The other circuits say "No".

The question is important to the public's perception of the *integrity* of the judicial process.

Is it permissible to lie in the Federal courts and cheat if there may be enough other evidence to support your case?

If so, why should not every litigant lie and cheat if he thinks he can get away with it?

What has he got to lose?

That is not the way other Circuits have interpreted Rule 60(b)(3). They say that *any* fraud which has a *material impact* on a trial should be cured by ordering a new trial. The Second Circuit says the fraud does not matter if you can find enough other evidence to sustain the judgment.

What does the Supreme Court say? What should the rule be? Is fraud *in* or *out* of Rule 60(b)(3)?

This Court's Rule 17.1.(a) says that the Court should consider a writ of certiorari whenever a U.S. Court of Appeals

> " . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. ***"

The *standard* of judicial proceedings found acceptable in this case is unworthy of any system of justice. It rewards knaves, liars and cheats, without so much as a raised eyebrow.

ARGUMENT

The Second Circuit Has Rewritten Rule 60(b)(3) In a Manner that Undermines the Integrity of Judicial Process

The Second Circuit read an interpretation into Rule 60(b)(3) which is contrary to the plain purpose and intent of the drafters. The District Judge stated this new interpretation as follows:

> Richard's exhaustive reexamination of the basis for the judgment fails to persuade the court that *the judgment was either* unsound or predicated *on the fraudulent conduct of Sherrier* (B-10) (Emphasis added.)

The District Court applied the wrong standard, and in affirming the Court of Appeals compounded the error. Rule 60(b)(3) does *not* require the moving party to show either that

-- the judgment was "unsound";

or that

-- the judgment was "predicated" on plaintiff's fraudulent conduct.

Rule 60(b)(3) mandates that a judgment be vacated when material fraud, misrepresentation, or other misconduct of an adverse party is established. The essence of the Rule is that a judgment should be set aside when justice so requires. *Klapprott v. United States*, 335 U.S. 601, 614-15, *mod. on other gds.*, 336 U.S. 942 (1949).

Contrary to the District Court's rewriting of Rule 60(b)(3), the moving party need not prove that the judgment was "predicated" upon the misconduct.

Rule 60(b)(3) Fed.R.Civ.P., applies to "judgments [that] were *unfairly* obtained, not at those which are factually

incorrect." *Rozier v. Ford Motor Co.*, 575 F.2d 1332, 1339 (5th Cir. 1978). (Emphasis added).

Rozier expressly held that under Rule 60(b)(3), Fed.R.Civ.P., material misconduct need not affect the judgment or alter the result of the case. 573 F.2d at 1339. In *Seaboldt v. Pennsylvania Railroad Co.*, 290 F.2d 296, 300 (3d Cir. 1961), this principle was restated as follows:

> As said before, it cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who was engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Minneapolis, St. Paul & S.S. Marie Ry. Co v. Moquin*, 1931, 283 U.S. 520, 521-522, 51 S.Ct. 501, 502, 75 L.Ed. 1243.

Similarly, *Square Construction Co. v. Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 72 (4th Cir. 1981), stated:

> Setting aside a judgment under FRCP 60(b)(3) does not require that the material withheld be sufficient to alter the district court's judgment.***

Once the fact of forgery of trial exhibits, or perjury or other misconduct is established, affecting material matter, there ceases to be any further issue of materiality. 2 *Restatement (Second) of Judgment* § 70, comment d (1982). If the perjured testimony, forgery of trial exhibits or misconduct played *any part* in influencing the court's judgment, it should be set aside. *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, 147 (7th Cir. 1966), *cert. denied*, 385 U.S 1003 (1967); *Atchison, Topeka & Santa Fe Ry. Co. v. Barrett*, 246 F.2d 846 (9th Cir. 1957); *Tas Int'l Travel Service, Inc. v. Pan American World Airways, Inc.* 96 F.R.D. 205, 207 n.5 (S.D.N.Y. 1982).

In *Peacock Records, Inc., supra*, the 7th Circuit ruled that:

> We hold that where it appears that perjured testimony may have played *some part* in influencing the court to render a judgment, the perjury will not be *weighed*, on a motion to set aside the judgment. This seems self-evident. The factual question which the district court failed to answer is, was the judgment obtained *in part* by the use of perjury? *Atchison T. & S.F. Ry. Co. v. Barrett*, 9 Cir. 146 F.2d 846, 849 (1957). If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice.
>
> 365 F.2d at 147 (Emphasis added.)

The 9th Circuit in *Atchison, Topeka, supra* stated the rule as:

> Where perjury has played some part in influencing the court or jury to render a judgment, the effect of the perjury will not be weighed on a motion to set aside the judgment.
>
> 246 F.2d at 849.

In other words, if the misconduct has *in any way* entered the factual matrix of the trial, the court cannot dissect the misconduct from the trial[1] That would require second-guessing "which can be little better than speculation****". *Minneapolis, St. Paul & S.S. Marie Ry Co. v. Moquin*, 283 U.S. 520, 521-22 (1931).

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[1] Where the fraud, misrepresentation or misconduct is that of a *third person*, rather than of an adverse party, the result is still the same, although a different provision of Rule 60 applies. 7 J. Moore, *Moore's Federal Practice* ¶ 60.24[5], at 60-216, 60-217 (1985); *Armour & Co. v. Nard*, 56 F.R.D. 610 (N.D. Iowa 1972) (fraud by third party cognizable under Rule 60(b)(6)).

Further it is *not* necessary to establish that giving the false testimony or using the false documents were *intentional* acts. *See, e.g., Bros. Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (false affidavit of plaintiff of material fact, showing that plaintiff knowingly prepared it is not necessary to vacate judgment).

It need *not* be established that the forged documents would have "changed the result of the case." *Seaboldt v. Pennsylvania Railroad Co.*, 290 F.2d 396, 300 (3d Cir. 1961). Similarly, it is *not* necessary to prove that the adverse party forged the documents; only that forged material documents were admitted into evidence. 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.24[5], at 60-216 (1985). Here the internal proof in the documents themselves showed that the plaintiff must have been aware of their falsity, despite the District Court's comments to the contrary. (B-10)

The District Court was simply wrong in its assumption that Petitioner had to prove: (1) a fraud upon the court; (2) that the adverse party himself forged the documents; or (3) that use of the forged documents was the sole premise for the result of the case.

Proof of the forgery *alone* provided the basis for vacating the judgment.

In a classic example of saying one thing and doing another, the Court of Appeals stated in its unpublished opinion:

> To prevail on a 60(b)(3) motion the moving party must (a) prove its assertion of fraud, misrepresentation or misconduct by clear and convincing evidence ... and (b) demonstrate that the perjured testimony "may have played some part in influencing the court to render a judgment," [quoting *Peacock Records, supra*].

As a statement of the law, it is unremarkable. Continuing:

> Thus, while this equitable doctrine does not require a showing that fraud necessarily affected the judgment ...

Precisely what *Rozier* and its progeny hold. Then the zinger:

> ... a finding that the fraud did not affect the judgment precludes relief.

The Court read "affect" to mean "control", and thereby made the "may have played some part" language entirely meaningless.

The Court of Appeals for the Second Circuit has adopted a new standard for 60(b)(3) motions, more stringent than anywhere else in this country. In the Second Circuit, a plaintiff can get away with perjury or misconduct which may have played a material part in influencing the court's judgment, so long as the District Court finds that the judgment was not entirely dependent upon the fraud. There is plainly no requirement in Rule 60(b)(3) or in the law of the other circuits that the movant must show that the fraud directly controlled the outcome of the case.

Judges in the lower Federal courts need the guidance of this Court concerning their obligation and authority in dealing with fraud by parties during the course of trial. That is why certiorari should be granted.

The 60 (b)(3) Motion was Timely Made

The Court of Appeal's *sua sponte* ruling that the Rule 60 (b)(3) motion was not timely is a miscarriage of justice. Mrs. Richard's intent to continue to press her 60 (b) motion was repeatedly spread out on the record over the course of a 3-year struggle to obtain a fair re-trial. It underlay every single court appearance.

This fact was explicitly recognized by the District Court in the decision on the first part of the motion:

> However, it might well be that further discovery will alter the present conclusions as to cost of the objects acquired, or indeed the court's present conclusions with respect to any possible fraud committed on the court. To that end Mrs. Richard's request for the issuance of letters rogatory under Rule 28(b), Fed.R.Civ.P. will be granted, though such action will not affect the finality of the judgment shortly to be modified. Any disputes concerning such discovery will be determined by this court, pursuant to Rule 27(b), Fed.R.Civ.P., even in the event an appeal is pending. If additional evidence is indeed forthcomming -- for example, should Siddik be located -- Mrs. Richard can again seek relief under rules 59 and 60, Fed.R.Civ.P. While Mrs. Richard's application is not a customary one, the action itself certainly has its unusual characteristics. (F-7)

On reconsideration, the District Court expanded Mrs. Richard's post-judgment discovery even further.

> As to the Afghan Silver, Richard contends that the money the court found that Sherrier spent to purchase the Princely and Elongated Buddhas was in fact used to purchase the Afghan silver collection. Testimony suggesting such a purchase might affect the court's findings concerning the cost of the Princely and Elongated Buddhas, and would, of course, affect the overall accounting. The court's initial rejection of Richard's application to examine Eisenberg is therefore reversed. Richard may examine Sadik and Eisenberg concerning Sherrier's interest in the Afghan Silver. (E-2-3)

Plaintiff had full and timely advance notice that the continued motion was in progress. The actual service of papers to bring on a hearing was a mere formality, the timing of which was primarily controlled by plaintiff's own obstructionist tactics. A look at the District Court's docket tells the story:

1. When Mrs. Richard sought the Pakistani address of Mohammad Siddik and Bedar Shah for purposes of sending letters rogatory, plaintiff refused to supply them. Over Sherrier's continuing opposition, she was forced to move for Court-ordered discovery, first from plaintiff, and then from William Wolff. By the time the addresses were finally obtained, three months had been wasted. (Never a word of criticism of plaintiff's conduct by the court.)

2. After Mohammad Siddik's genuine signature was obtained on his answers to the letters rogatory, Sherrier's counsel refused to make available the original Trial Exhibits 15 and 15A, which were in his possession, so they could be photographed for examination by a forensics expert. This obstructionist tactic once again necessitated a formal motion for a court order to permit the examination and copying to take place, producing more delay. (Again no word of criticism from the court.)

3. On plaintiff's motion, the District Court entered an order setting a cut-off date for Mrs. Richard's post-trial discovery in aid of the ongoing Rule 60(b) motion. The formal papers to renew the 60(b) motion were served on the very first day following the cut-off date for discovery.

4. Judge Sweet's opinion of April 27, 1984, said that if additional evidence of fraud were forthcoming from the Court-ordered discovery, Mrs. Richard could again seek relief under Rules 59 and 60, Fed.R.Civ.P. Since one year from the date of the original judgment ended only a few days after that decision, it is obvious that Judge Sweet contemplated the renewal of the motion as being within the original 60(b) time limitation.

It is particularly ironic that in this case, while the plaintiff's pre-judgment trial fraud was being investigated by great effort and expense, his own post-judgment obstruction of that investigation should be rewarded by the Court of Appeals giving

him immunity from judicial scrutiny on timeliness grounds. The justice system seems to have been turned upside down.

CONCLUSION

The petition for a writ of certiorari should be granted to maintain the integrity of the Federal judicial system.

Dated: New York, New York
January 14, 1987

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of October, One Thousand Nine Hundred and Eight-Six.

Present: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

JULIAN SHERRIER,

Plaintiff-Appellee,

v. 86-748

BERNICE RICHARD,

Defendant-Appellant.

ORDER

Bernice Richard appeals from an order of the District Court for the Southern District of New York (Robert W. Sweet, Judge) denying her second motion under Fed.R. Civ. P. 60(b)(1)-(3) for relief from an amended judgment entered in favor of Julian

Sherrier after a bench trial. Richard contends that Sherrier engaged in fraud, misrepresentation, or other misconduct in his original pleading or, alternatively, that newly discovered evidence warrants further amendment of the judgment. For reasons that follow, we affirm.

1. Richard's motion is procedurally defective because it was filed after the one-year limitation period specified in Rule 60(b) for motions relying on subdivisions (1) - (3) of the Rule. Richard suggests three reasons why her motion should not be time-barred: the District Court allegedly granted her leave to renew her initial Rule 60(b) motion, the delay in filing was allegedly caused by Sherrier's "obstructionist" tactics during post-judgment discovery, and Sherrier failed to raise the issue of timeliness before the District court. None of these arguments is persuasive. First, the District Court did not grant Richard leave to renew her 60(b) motion in disregard of the applicable time limit but merely noted that "[i]f additional evidence is indeed forthcoming -- for example, should Siddik be located -- Mrs. Richard can again seek relief under Rules 59 and 60, Red. R. Civ. P." Second, the one-year period establishes the outer limit of "reasonable time" for filing such a motion, and the District Court was without power to consider a motion filed later. *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984); *see also*, 7 J. Moore and J. Lucas, *Moore's Federal Practice* ¶ 60.24[4] (2d ed. 1985). Third, this Court may consider the issue of timeliness even though it was not raised below.

2. In any event, the motion was properly denied on its merits. To prevail on a 60(b)(3) motion the moving party must (a) prove its assertion of fraud, misrepresentation, or misconduct by clear and convincing evidence, *Square Construction Company v. Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71 (4th Cir. 1981); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978), and (b) demonstrate that the perjured testimony "may have played some part in influencing the court to render a judgment," *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, 147 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Restatement (Second) of Judgments* § 70, comment d (1980). Thus, while this equitable doctrine does not

require a showing that the fraud necessarily affected the judgment, a finding that the fraud did not affect the judgment precludes relief.

Our review of a motion under Rule 60(b) is limited to determining whether the District Court acted within its discretion. *In re Emergency Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981). The District Court's findings that Sherrier [sic] failed to establish either requirement under Rule 60(b)(3) meet that standard. First, after holding a hearing to review Richard's evidence concerning the authenticity of the questioned documents, the district court determined that though the documents were shown to be not authentic and erroneously admitted, Richard's circumstantial evidence failed to establish convincingly the existence of fraud. Moreover, no evidence demonstrated that the forged signature was in any way attributable to Sherrier. Second, the district court explicitly considered whether the alleged fraud influenced its judgment in any way. Judge Sweet noted that because of the general problem of credibility at trial, he has scrutinized all testimony carefully and relied on independent evidence in determining the existence of a joint venture and the validity of the prices established by experts. In particular, he had viewed with skepticism the questioned documents that had been authenticated by Sherrier. Based on this assessment, the court found that "the demonstration of their inauthentic nature does little to disturb the court's findings." Because the District court determined that the alleged fraud did not influence its findings and was not a material basis for the judgment, Richard was properly denied relief.

The order of the District court is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported cited, or otherwise used in unrelated cases before this court or any other court.

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_____

_____

Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIAN SHERRIER,

Plaintiff,

– against –

BERNICE RICHARD,

Defendant.

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By: WHITNEY NORTH SEYMOUR, JR., ESQ.
CLAUDE P. BORDWINE, ESQ.
Of Counsel

OPINION

82 Civ. 3723 (RWS)

A factual hearing was held on February 26, 1986 to determine certain factual issues raised by the motion of defendant Bernice Richard ("Richard") to vacate the judgment in this action on the basis of fraud, misrepresentation or other misconduct. Fed.R.Civ.P. 60(b)(3). Plaintiff Julian Sherrier ("Sherrier") has brought a cross-motion seeking amendment of the judgment. The circumstances leading up to these motions are set forth in this court's opinion of December 19, 1985. For the following reasons both motions will be denied.

Facts

The factual hearing focused on signatures purported to be of Mohammed Siddick ("Siddick") found on two documents that were introduced as exhibits at trial. Richard produced four expert witnesses at the hearing who compared these signatures (the "questioned signatures") to those signatures of Siddick which were executed before the High Court of Peshawar, Pakistan in connection with Siddick's response to letters rogatory (the "known signatures"). These experts each testified that the questioned signatures on Exhibits 15 and 15A were not written by the same person who executed the letters rogatory. In sum, the experts noted that the known signatures were written with a flowing curved style in which the combination of letters were written in a series of descending movements following a consistent base line and upper line. The diacritical markings in the known signatures were precisely placed one above the other. On the other hand, the questioned signatures were characterized as angular and erratic, written with a poor quality of pen control. The base line of the questioned signatures was slanted rather than consistently level and the letter formations were extended above and below the base line to a significantly greater extent than did the known signatures. Finally, the experts demonstrated marked differences in the formation and shape of particular letters.

The expert called on behalf of Sherrier only partially rebutted the testimony of Richard's experts. While stating that certain of the letter foundations were similar, Sherrier's expert also recognized that the two questioned signatures were not written fluently but rather were marked by a strong hesitation in forming the characters. On cross-examination, he also noted the difference between the round forms of the known signatures as compared to the angular features of the questioned signatures but stated that these differences could be attributed to disparities in the person's mental or physical capabilities resulting from factors such as intoxication or drug use at the time the questioned signatures were executed. Finally, Sherrier's expert hypothesized that the hesitation found in the questioned signatures was possibly due to an attempt to disguise the true handwriting of the person.

Based on the expert testimony presented, Richard has established that Siddick did not sign Exhibits 15 and 15A. It is necessary, therefore, to consider the consequences of this new finding for the judgment rendered three years ago.

Exhibits 15 and 15A were documents obtained at the request of Sherrier for the purpose of confirming his purchases of sculpture and other business dealings with Siddick. Exhibit 15 and the accompanying invoices were said to have been prepared in 1980 at the time Sherrier and Richard were attempting to resolve their differences and after Richard had requested confirmation of the disputed transactions. Exhibit 15A was prepared after the litigation in this court had commenced. Sherrier's counsel explained that in anticipation of the injunctive hearing, he requested Sherrier to get whatever documentation that would verify his claims and that Sherrier telephoned Bedar Shah in Pakistan to request him to obtain further evidence of the transactions between Sherrier and Siddick. Citing the distinctive wording of Exhibit 15A; its similarity to Sherrier's deposition testimony; the possible similarity of the style of signature to that of Sherrier's handwriting and the use of a typewriter with a dollar symbol, Richard contends that Sherrier might have prepared and signed Exhibit 15A himself and then sent it to Pakistan for

notarization with the intent to create a forgery for presentation into evidence.

These threads of evidence, however, fail to establish that Sherrier has perpetrated a fraud upon the court. Indeed, it is possible that Siddick was the only person responsible for his forged signature as a means of avoiding attesting to a document setting forth illegal conduct. *Compare Associates Discount Corp. v. Goldman*, 52 F.R.D. 37, 40 (W.D.Pa 1971) (allegation of forgery, if substantiated, would support claim of fraud under Rule 60(b)(3) since the signature was attested to by an employee of the adverse party as a subscribing witness).

The other link between the forged documents and Sherrier is that Sherrier established whatever foundation there was for their admissibility by testifying that he was familiar with Siddick's signature because he had seen it on invoices in Siddick's office in Peshawar and that to the best of his knowledge the signature was that of Siddick. Recognizing the equivocal basis on which the identification of Siddick's signature was based, the court at trial expressed its real "real reservations" about the authenticity of the documents. Nevertheless, they were admitted under an expansive interpretation of the Federal Rules of evidence which the court deemed appropriate in the context of a bench trial. This decision regarding the admissibility of the documents has now proven to be in error. Therefore, the implications of this error will be considered even though there has not been a sufficient showing that Sherrier intentionally misrepresented the authenticity of Siddick's signatures.

Siddick's Participation in the Pakistan Transactions

The first issue raised by Richard contests the very participation of Siddick in the transactions at issue in this case, claiming that Sherrier falsely testified about his dealings with Siddick. In his responses to post-trial interrogatories, Siddick categorically denied ever meeting with Sherrier or transacting any business with him. In addition, Richard notes the testimony of William Wolff an art dealer who travelled to Peshawar during the period

in question to purchase Gandharan art, using the same intermediary as did by Sherrier. Wolff testified that the only local dealer who he met on this trip to Peshawar was a man by the name of Sadar Khan, that he was never introduced to Siddick and that he was shown the Seated Buddha in the home of Khan on June 3, 1979. According to his testimony, Sherrier purchased this same piece from Siddick during his 1979 trip to Pakistan. Finally, Wolff testified that in his conversations with Sherrier regarding Gandharan art dealers, he never recalled Sherrier mentioning Siddick's name.

Siddick's own denials of his relationship with Sherrier are of little or no probative value, since it has been established that the transactions at issue are illegal under the law of Pakistan and given the severe penalties attendant to such crimes, a Pakistan dealer would be loath to admit to them. Moreover, Sherrier has demonstrated a bank transfer of funds to Siddick in 1982, and has produced the declaration of a money lender, Shiraz Gul, who independently confirms the transactions between Sherrier, Shah and Siddick in 1980.[1] On balance, given Sherrier's sworn testimony which was not completely relied upon, Siddick existed and had a relationship with Sherrier. Of course, his existence is less material than the monetary questions which would be raised if he had not existed.

The Methods of Payment

Richard's attack on Sherrier's testimony includes the method of payment for Gandharan art objects and its concomitant effect on the transactions with which she and Sherrier were involved. Wolff testified that although the local dealers always requested cash, he insisted paying by check so that he would obtain a record of the transaction. Sherrier sated that it was

[1] There is no indication why this document was not produced at trial, but given the favorable inferences which it contains, it is unlikely that Sherrier withheld it intentionally. The only aspect of the transactions which are unsupported by the Gul letter is the ransom demand which was also rejected at trial.

customary to pay cash for sculpture and that the local dealers generally refused to issue receipts. In addition, however, he also testified that it is possible to pay by check with the payee's name left in blank, the means by which Wolff made his purchases. The fact that Sherrier paid cash and Wolff by check does not establish that Sherrier did not make the payments he claimed to have made for the Buddhas at issue.

The Value of the Buddhas

The central contention of Richard's motion for a new trial is that Sherrier's testimony was false in that Siddick did not exist, the payments were unverified and therefore she concludes that the purchase prices of the four Buddhas was overstated and that Sherrier used some of Richard's funds to purchase other art objects for which there should be a further accounting. Wolff's testimony was principally relied upon by the court to confirm the price paid by Sherrier for the Buddhas, and Richard now contends that this testimony was fraught with a mistake.

Wolff confirmed at trial that a purchase price of $160,000 would have been a good price for the Standing and Seated Buddhas in 1979. He then testified with regard to the 1980 purchases of the Princely and Elongated Buddhas that it would have been impossible to purchase the two together for $150,000. Instead, he asserted that each one of them would have cost between $125,000 and $150,000 to purchase in Peshawar. He further testified that he was offered the Princely Buddha for $200,000 in Karachi during 1980.

In a post-trial deposition now relied upon by Richard, Wolff stated that he was mistaken about having seen the Princely Buddhas in Karachi for the piece he saw was broken on the ankles while the Princely Buddhas was intact. In pursuing this issue, Wolff indicated that the statue which he was shown in Karachi for an asking price of $200,000 was not as good as others he had previously purchased for $100,000 to $40,000. Finally, he

concluded that he was unable to recall whether the Princely Buddha to which he testified at trial was more or less valuable than the Buddha seen in Karachi.

While this post-trial evidence indicates a mistaken belief by Wolff during his trial testimony, it does not overturn any of his expert testimony on the issue of the 1980 purchase prices for the Elongated and Princely Buddhas. Wolff's estimates of the Princely Buddha's price did not track the $200,000 asking price in Karachi but rather was based on the much lower estimate of $125,000 to $150,000. This lower estimate is in keeping with is post-trial testimony regarding his own purchases. Furthermore, since Wolff testified at trial that the Elongated Buddha was a more interesting piece than the Princely Buddha, his post-trial estimate of $100,000 to $110,000 purchase price for a Buddha similar to the Princely Buddha would not upset a conclusion that the Elongated and Princely Buddhas were purchased by Sherrier for $250,000 and that to purchase both for $150,000 would have been impossible. Therefore, Richard has now adduced no new evidence that would controvert the findings at trial regarding the purchase prices of the Buddhas other than the circumstantial evidence already considered.

Other Alleged Purchases

The record, as supplemented through post-trial discovery and the cognizance of the forged exhibits, continues to support the findings in the trial opinion regarding the prices paid for the Gandharan Buddhas and thus undermines any inferences drawn by Richard regarding the use of her funds towards the purchase of other art objects during 1980. An examination of the new evidence proffered by Richard indicates that there is insufficient evidence of Sherrier's ownership interests in these objects.

With regard to the silver collection, Sherrier testified at trial that he brought the collection to the United States on consignment with the understanding that if unable to sell the collection with a specified time, it would be returned. Sherrier testified that the silver was returned in 1980. Richard now claims to have

established evidence that Sherrier in fact possessed an ownership interest in the silver.

First, she suggests that Sherrier testified falsely about returning the collection. However, the evidence of additional photographs being ordered by Sherrier in 1981 does not establish his ownership of the pieces. In addition, the post-trial testimony of Jerome Eisenberg, a dealer with whom Sherrier exhibited the collection in New York, is singularly inconclusive about the status of the collection. Eisenberg did not state that Sherrier ever indicated any ownership interest in the silver collection but indicated that both Sherrier and Shah were acting as agents in the sale of the collection. While Eisenberg's testimony indicates that Sherrier had a continuing interest in marketing the silver collection after 1980, this testimony does not establish Sherrier's ownership of the collection nor does it establish that Sherrier testified falsely about returning the collection to Pakistan in 1980. Sherrier's activities in connection with the restoration of the silver in 1984 are similarly speculative regarding the owner of that collection.

Richard has pointed to several other items, as she did at trial, which were allegedly purchased by Sherrier with her funds. The Garuda group was allegedly purchased in 1979 with Richard's money, but that claim was dismissed at trial and post-trial evidence from Spinks in London tends to confirm that the piece was shown to one of the directors there as early as 1978. Similarly, the Spinks representative has confirmed that the Gwalior bust was taken by Sherrier on consignment from Spinks and was charged to his account in late 1980 at about the same time as Spinks accepted a piece from Sherrier. Finally, there is no indication on the present record to indicate Sherrier's purchase or ownership of two pieces referred to as the Six-Foot Standing Buddha and the Stylized Frieze of a Seated Buddha.[2]

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[2] Similarly, the oblique reference to "property" in the Gul letter of November, 1980, fails to establish any probative link between any of these pieces and the funds invested by Richard.

The Unavailability of Bedar Shah

Finally, Richard has asserted that Sherrier deliberately deceived the court as to the unavailability of Bedar Shah to testify as a witness on behalf of Sherrier. Sherrier explained at trail that Shah would have attended but for difficulties in obtaining the necessary travel papers. On the other hand, there are indications that Shah has travelled several times to the United States since 1981.

Nevertheless, even if the court were to draw an inference that Shah's testimony would be unfavorable to Sherrier's case, there is no basis to conclude that his absence constituted a fraud or otherwise requires a modification of the judgment. Wolff's testimony confirmed the existence of Shah as a broker in those Pakistan art objects and further conveyed the elusive and unpredictable manner in which meetings with the local brokers and dealers were arranged. The judgment cannot be overturned by speculation as to the substance of the testimony of any absent witness.

The Alleged $50,000 Down Payment

In response to Richard's motion to vacate the judgment, Sherrier has cross-moved to modify the judgment by reinstating the alleged $50,000 down payment in the Standing and Seated Buddhas which was disallowed in the opinion of April 27, 1984. Sherrier, however, has adduced to new evidence in connection with this motion. His arguments regarding the unwillingness of Pakistani citizens to testify to the underlying transactions was considered and rejected in the light of the circumstances attendant to the alleged transaction with the Fancys described in the April, 1984 opinion. That other Pakistanis have also denied involvement with similar transactions does not require a further amendment of the judgment.

Conclusions

As has previously been noted by the court of Appeals in this action, a motion under Rule 60(b) is committed to the sound

discretion of this court. *Sherrier v. Richard*, No. 84-7585 (2d Cir. December 3, 1984). *See also Atchison, Topeka & Santa Fe Ry. Co. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957). Richard's exhaustive reexamination of the basis for the judgment fails to persuade the court that the judgment was either unsound or predicated on the fraudulent conduct of Sherrier. A fraud upon the court exists where there was an "unconscionable plan or scheme which [was] designed to improperly influence the court in its decision." *England v. Doyle*, 281 F.2d 304, 309 (9th cir. 1960). Similarly, perjured testimony during a trial may establish fraud or misrepresentation within the meaning of Rule 60(b). *See Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145 (7th Cir. 1966).

Richard's demonstration that the court erroneously admitted documents into evidence which were inadequately authenticated and later shown to be inauthentic does not lead ineluctably to the conclusion that Sherrier perpetrated a fraud upon the court. Sherrier's participation in the alleged fraud has not been convincingly established and a reconsideration of the evidence absent the forged exhibits has been conducted.

Richard has sought to draw broad inferences from circumstantial evidence surrounding transactions which were, by their very nature, kept in the dark by all parties involved. Moreover, as noted previously, this action was marred by the testimony of both Sherrier and Richard which lacked candor and reliability. Despite the analysis offered by Richard on this motion, the judgment rests on solid footings established at trail regarding the existence of a joint venture between the two principals and the validity of the prices paid as established by independent expert testimony. Given the skepticism with which the questioned documents were initially viewed by the court and the lack of weight which they carried in rendering the court's opinion, the demonstration of their inauthentic nature does little to disturb the court's findings.

For the foregoing reasons, both Richard's motion to vacate the Sherrier's motion to amend are hereby denied.

IT IS SO ORDERED.

Dated: New York, NY
May 22, 1986

ROBERT W. SWEET
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIAN SHERRIER,

Plaintiff,

—against—

BERNICE RICHARD,

Defendant.

MEMRANDUM OPINION

82 CIV. 3723 (RWS)

SWEET, D.J.

Defendant Bernice Richard ("Richard") has brought a motion pursuant to Fed.R.Civ.P. 60(b)(3) seeking to vacate the judgment in this action on the basis of "fraud...misrepresentation, or other misconduct on the part of [the] adverse party" Julian Sherrier ("Sherrier"). Sherrier has brought a cross-motion seeking amendment of the judgment. As set forth below, Richard has raised a factual issue regarding the alleged fraudulent use of forged documents in the trial of this action which requires a factual hearing before the underlying motions can be resolved.

Prior Proceedings

The bitter and protracted proceedings in this action began with the filing of Sherrier's complaint on June 7, 1982, alleging that he owned five pieces of Gandharan art which were being withheld by Richard. After expedited discovered pursuant to an order to show cause for a preliminary injunction, a consolidated

hearing and non-jury trial on the merits was held during October, 1982. Judgment rendered by this court's opinion of March 16, 1983 held that Richard and Sherrier had entered into a joint venture for the purchase of Gandharan art and that the four pieces of art obtained throught this partnership should be divided between the two parties. The court further found that one large piece was solely owned by Sherrier subject to Richard's security interest and that another bronze piece was solely owned by Richard. An equitable judgment was accordingly rendered.

The final judgment of the court was subjected to several assaults which are fully set forth in the subsequent opinions of April 27, June 22, July 10, in 1984 and January 4, January 22, and May 14 of 1985. Briefly, this post-trial peregrination was commenced by an order granting Richard permission to take additional testimony from the witnesses which directly contradicted Sherrier's claimed expenditure of $50,000. Upon this finding, the judgment was amended but not fully reopened. The Court of Appeals affirmed this amendment, holding that the false testimony regarding the alleged $50,000.00 down payment did not require that the judgment be vacated in light of the independent evidence establishing the joint venture and the rights of the parties. Following further applications by Richard to take additional testimony which were granted, several additional depositions have now been completed and the present motions have been submitted following oral argument on October 11, 1985.

Facts

A. *Forged Exhibits*

In support of the order to show cause which initiated this action, Sherrier submitted an affidavit dated June 3, 1982 which set forth his version of the facts underlying his claim. Together with his affidavit, Sherrier submitted several exhibits which purported to be receipts for the purchases of Gandharan statuary in 1979 and 1980. These pieces -- the Standing, Seated, Elongated and Princely Buddhas -- were later found by the court to have been purchased by Sherrier using the funds of Richard within the scope of the joint venture. The receipts were written on the

stationery of the "Oriental Import and Export Agency", in Peshawar, Pakistan and contained either the signature or typewritten acknowledgement of Mohammed Siddick ("Siddick") the proprietor of that business.

In addition to these receipts, Sherrier produced for the court an affidavit dated August 11, 1982 which purported to be a statement by Siddick setting forth a list of the four Gandharan pieces and their prices. The affidavit further stated that Siddick had given Sherrier a silver collection on consignment but that Sherrier, unable to sell the silver, had returned the silver to Siddick's representative in December, 1980.

Each of these documents were introduced at trail after a foundation had been laid by Sherrier. Sherrier testified that he was familiar with Siddick's signature, having often seen invoices signed by Siddick in connection with his business in Peshawar. The authenticity of these documents have been challeged by Richard on this motion. In response to the post-trial issuance of letters rogatory to Siddick which were executed before the High Court of Peshawar on April 2, 1985, Siddick denied any knowledge of Sherrier or of the transactions which formed the basis of this action. More significant than these bare denials is the fact that Siddick's signatures on the letters rogatory appear to differ markedly from the signatures on the documents offered at trial.

Richard has submitted the opinions of three experts in handwriting analysis which conclude that the signatures on the receipt and affidavit submitted at trial were not written by the same person who responded to the letters rogatory. Sherrier's response has been two-fold. Sherrier offers another expert who reaches the opposing conclusion that there exist sufficient similarities in the signatures to conclude that the same person signed each document. The expert for Sherrier suggests that the signatures on the trial documents were written in a distorted manner and hypothesizes that the writer was attempting to disguise his signature. Sherrier supports this conclusion by arguing on this motion that Siddick must have desired to avoid detection of this trading in Gandharan objects by attempting to disguise his

signature. Alternatively, Sherrier argues that any discrepancy in signatures may be explainable on the hypothesis that Siddick may have sought to avoid detection by taking the further step of having a surrogate sign the documents in his stead.

As further indication of the forged nature of Siddick's affidavit, Richard notes that the affidavit was notarized by a Pakistani Notary Public at Rawalpindi, located 150 kilometers distant from the Peshawar address of Siddick. Richard argues that there exist numerous notaries in Peshawar who are competent in the English language and, therefore, the execution of the document in Rawalpindi raises the inference that the affidavit was executed by another person.

The resolution of this alleged use of fraudulent evidence cannot be made on the basis of the papers submitted by the parties but rather must be determined after a factual hearing on this issue.

B. *False Testimony*

Richard further asserts that Sherrier's testimony at trial was perjured in many material respects, and specifically focuses on Sherrier's testimony regarding his dealings with Siddick, his possession of a silver collection in 1980, his relationship with Bedar Shah ("Shah"), and his possession of several other Gandharan art objects in 1980.

After preliminary examination of the evidence setting forth the basis for alleging the perjured testimony of Sherrier, the court finds no need to request any additional fact-finding on these issues since the evidence is fully set forth in the excerpts from post-trial depositions and exhaustive analysis by skilled counsel. However, since at least one issue -- the relationship between Sherrier and Siddick -- may be influenced by the evidence relating to the Siddick exhibits, the court will reserve its findings on these matters until the factual hearing on the allegedly forged exhibits has been presented.

For the foregoing reasons, a hearing on the veracity of the documents allegedly prepared by Mohammed Siddik will be held during the week of January 6-10, 1986 or as soon thereafter as permitted by the schedules of counsel for both parties.

IT IS SO ORDERED.

DATED: New York, N.Y.
December 19, 1985

ROBERT W. SWEET
U.S.D.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of December, one thousand nine hundred and eighty-four.

PRESENT:

HON. HENRY J. FRIENDLY,
HON. RALPH K. WINTER,
HON. GEORGE C. PRATT,

Circuit Judges.

JULIAN SHERRIER,

Plaintiff-Appellee,

—against—

Docket No. 84-7585

BERNICE RICHARD,

Defendant-Appellant.

Appeal from a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, Judge.

This case came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Defendant Bernice Richard's first argument is that the district court's original judgment must be set aside because the plaintiff, Julian Sherrier, committed perjury and fraud upon the trial court. Mrs. Richard claims that the district court had no discretion to deny her Rule 60(b) motion once the court, in post-trial proceedings, had made the explicit finding that Sherier had given false testimony at trial about the $50,000 allegedly paid to Samir Fancy. We are satisfied, however, that the district court did have discretion in this matter and that its discretion was properly exercised.

In general, "[a] motion under Rule 60(b) is addressed to the sound discretion of the trial court", and the appellate courts are "restricted to determining whether the [district] court abused its discretion." *Matter of Emergency Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981). In the present case the district court found that Sherrier had given false testimony, but the court did not go so far as to determine that he had committed perjury. In its original decision the court repeatedly stressed the fact that "neither Bernice [Richard] nor Julian [Sherrier] was completely credible during the trial." *Sherrier v. Richard*, 564 F.Supp. 448, 457 (S.D.N.Y. 1983); *see id.* at 450. For each of the many facts in dispute Judge Sweet had to make a separate and careful determination about who had told the truth. The new finding that Sherrier's account of the $50,000 payment was false changed one factor in the district court's calculations, but there was still adequate evidence to uphold the fundamental decision on the ownership rights in the various works of art.

As for the Padmapani Bronze, the trial court decided in Mrs. Richard's favor and she can have no complaint. Although the court found that Mrs. Richard had no ownership interest in the Fasting Buddha, this determination was not based on Sherrier's testimony, but upon the defendant's own admissions and upon the testimony of her witness. *Id.* at 454-55. The decision on the ownership of the other Buddhas is similarly supported by

testimony apart from that of Sherrier. Given the independent evidence for the district court's conclusions, and given the fact that Judge Sweet had never placed complete reliance on Sherrier's testimony, we conclude that the court did not abuse its discretion in deciding to amend its judgment rather than to set it entirely aside.

2. Defendant's second argument is that Sherrier's fraud upon the defendant -- that is, Sherrier's false report to Mrs. Richard about the use of the $50,000 -- vitiated the joint venture and left the plaintiff with "unclean hands", thus barring him from obtaining court enforcement of the joint venture agreement. This argument is also unpersuasive. The goal of the joint venture -- to purchase valuable works of art at profitable prices -- was in fact accomplished. There is no complaint that the art works obtained by Mr. Sherrier are not highly valuable pieces. Because Sherrier's misappropriation of the $50,000 failed to "taint the entire enterprise", the plaintiff is not automatically and totally deprived of his claim for relief; in this situation a court must balance the equities to determine whether a plaintiff will be barred from recovery. *Janke v. Janke*, 47 A.D.2d 445, 451, 366 N.Y.S.2d 910, 916 (1975), *aff'd* 39 N.Y.2d 786, 385 N.Y.S.2d 286 (1976). In the present case we cannot say that the district court's resolution is inequitable. The court's order dissolving the joint venture leaves Mrs. Richard with a substantial profit on her investment and provides a permissible resolution of the parties' tangled relationships.

3. Defendant's third argument for reversing the district court is that the trial court's secrecy order was fraudulently procured and misused by plaintiff. The district court had sufficient evidence before it, however, to decide that secrecy was needed to protect the Fancy family, and it is significant that the court's order did not bar defendant's trial counsel from independently investigating the Fancys to learn whether Sherrier's statement about their role were correct. Defendant's present counsel now argues that the secrecy order prevented trial counsel from freely discussing the Fancys with Mrs. Richard, thereby depriving the defendant of the opportunity to press her attorney to make a more thorough check on the Fancys and on Sherrier's story.

Whether Mrs. Richard would have actually used that opportunity in the way her current counsel suggests, and whether her efforts would have significantly changed the trial, are matters too speculative to warrant a new trial.

4. Defendant's other arguments also fail to warrant reversal of the district court, and we conclude that the district court's amended judgment must be affirmed.

Hon. Henry J. Friendly, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. George C. Pratt, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIAN SHERRIER,

Plaintiff,

– against –

BERNICE RICHARD,

Defendant.

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82 Civ. 3723 (RWS)

OPINION

APPEARANCES:

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By: NORMAN JAY ITZKOFF, ESQ.
Of Counsel

Defendant Bernice Richard ("Richard") has moved for reargument of the decision rendered on Richard's motions (1) to vacate the judgment and dismiss the complaint, (2) for a new trial, (3) to examine a representative of Spink & Son, Ltd. ("Spink"), concerning the Garuda Group and dealings with plaintiff Julian Sherrier ("Sherrier"), (4) to examine Azhar Sadik ("Sadik") concerning Sherrier's interest in a collection of Afghan silver, (5) to examine Jerome N. Eisenberg ("Eisenberg") concerning Sherrier's interest in the Afghan silver; and Sherrier's motion to modify the judgment by awarding Richard the Elongated Buddha. Richard has also moved to vacate this court's confidentiality order entered before the trial of this action and alternatively has requested permission to disclose portions of Sherrier's trial and pretrial testimony regarding Michael Dollard, and portions of the trial and pretrial testimony of William Wolff and Martin Lemer. Richard has also moved to stay execution of the modified judgment pending appeal and to direct Richard to withdraw the restraining notice served on Sofia Bros. Warehouse upon the filing of an affidavit by Sherrier setting forth an inventory of the contents of Room 848 and a statement of Sherrier's rights to such contents.

Richard's motion to reargue the denial of her previous motion to dismiss or for a new trial is denied, no new evidence or controlling legal principles having been set forth as having occurred since that decision. The Jacovoni controversy is neither central to the dispute nor in my view favorable to Richard.

As to the Garuda group, Richard contends that Sherrier converted not only the $50,000 which he claimed to have given to Samir Fancy in 1979, but also a portion of the $150,000 that Richard sent him later that year in Pakistan and used this money to buy the Garuda group for himself. Because this question may shed light on the costs of the objects acquired and on any fraud on the court, Richard's request to examine a Spink representative on this matter is granted.

As to the Afghan silver, Richard contends that the money the court found that Sherrier spent to purchase the Princely and Elongated Buddhas was in fact used to purchase the Afghan silver collection. Testimony suggesting such a purchase might affect

the court's findings concerning the cost of the Princely and Elongated Buddhas, and would, of course, affect the overall accounting. The court's initial rejection of Richard's application to examine Eisenberg is therefore reversed. Richard may examine Sadik and Eisenberg concerning Sherrier's interest in the Afghan Silver.

As to the confidentiality question, this court's order of September 24, 1982 stated:

> 13. Any information already disclosed by Mr. Michael Dollard or plaintiff on the existing "confidential transcripts" or to be disclosed concerning transactions or dealings with persons who are not parties to this lawsuit, or artworks other than the disputed works of art shall not be disclosed or utilized by defense counsel in any manner without further order of this court.

This order is hereby modified to the extent that the confidential matter covered by it may be used by the parties to make further investigations or to depose the persons who originally disclosed the confidential matter. However, the confidential matter covered by paragraph 13 may not be disclosed to third parties without application on notice to this court. Richard's application to disclose Sherrier's testimony regarding Michael Dollard, and the testimony of William Wolff and Martin Lerner, is denied upon the record as it now stands with leave to renew in the event that additional facts are presented.

An amended judgment ("Amended Judgment") in accordance with this court's April 27, 1984 opinion has been signed by the court this day. In regard to the Amended Judgment, the court has determined that if Sherrier were permitted to satisfy the judgment against him by transferring both the Elongated and Princely Buddhas to Richard, all the risk as to the sale price of the Buddhas would be transferred to Richard. Accordingly, the Amended Judgment requires Richard to choose one of these two Buddhas and grants Sherrier possession of the other and a credit of $350,000, which was the declared value of both Buddhas. Richard's motion to stay enforcement of the Amended Judgment, as well as her application regarding the inventory of goods in

Room 848, is denied. Both parties are given leave to present applications as may be required to enforce the Amended Judgment.

IT IS SO ORDERED.

DATED: New York, N.Y.
June 22, 1984

ROBERT W. SWEET
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIAN SHERRIER,

Plaintiff,

– against –

BERNICE RICHARD,

Defendant.

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82 Civ. 3723 (RWS)

OPINION

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After a two-week non-jury trial, this court rendered an opinion dated March 16, 1983. The facts found in that opinion will not be repeated here. Judgment was entered on May 6, 1983. Defendant Bernice Richard ("Mrs. Richard") has now moved pursuant to Fed.R. Civ.P. 60(b) for relief from the judgment and for an evidentiary hearing on the motion pursuant to Fed.R. Civ. P. 43(e), for a new trial pursuant to Fed.R.Civ.P. 59(a), for the issuance of letters rogatory, and for a further deposition. Plaintiff Julian Sherrier ("Sherrier') has moved for a stay of enforcement of the judgment, relief from the judgment, a protective order, and an order punishing Mrs. Richard for contempt and reducing the judgment for attorney's fees. Following further submissions and, if necessary, a hearing, the judgment will be amended pursuant to the findings set forth below. Her motion for the issuance of letters rogatory is granted, but the motion for a new trial is denied at this time, and all other motions are denied.

To state the obvious, this has been a difficult, tortuous litigation, and the court and counsel have repeatedly sought to escape its coils, only to be ensnared again. A brief review of the difficulties presented after entry of judgment on May 6, is appropriate. An appeal was filed and ultimately dismissed on procedural grounds. A number of applications were made to this court, including six formal motions and a number of informal applications contained in the some 38 letters received from counsel. Included in these matters have been two substitutions of counsel for Mrs. Richard, a petition by one of her former counsel to establish an attorney's lien, and applications to take the depositions of witnesses Jimmy Fancy ("Jimmy") and Samir Fancy ("Samir"), which were granted. The Fancy depositions were completed on December 16, 1983 and January 19, 1984, respectively. The court requested final submissions with respect to all pending applications to be made by March 2, 1984. Skilled counsel have complied and the pending matters are now appropriate for resolution. In the event that some requests have escaped attention, leave is hereby granted to renew any such requests within ten (10) days.

Mrs. Richard's motions to vacate the judgment and for a new trial are based on the recently available testimony of the Fancys which contradicts Sherrier's trial testimony. Sherrier testified that he had paid $50,000 to Samir, Jimmy's son, in London to hold for inspection and possible purchase of the Fancys' collection of Gandharan art. The court found that on Sherrier's request, Mrs. Richard sent the $50,000 to him in London for that purpose. Sherrier testified that he was later reimbursed in rupees in Pakistani when the collection proved to be unavailable. The court found that after Sherrier obtained the reimbursement, in the company of a middleman named Bedar Shah ("Shah") he was introduced to Mohammad Siddik ("Siddik") and that Sherrier purchased the Standing Buddha and the Seated Buddha from Siddik for $160,000, using the refunded $50,000 and an additional $110,000 forwarded by Mrs. Richard. The court also credited Sherrier's testimony that he expended an additional $21,000 to acquire the Standing and Seated Buddhas and to arrange for their transportation. Afterward, Sherrier gave an accounting of the expenses Sherrier incurred in the acquisition of these Buddhas to Mrs. Richard and her lawyer.

The depositions of the Fancys, father and son, directly contradict Sherrier's trial testimony and his affidavits of October 10 and November 4, 1983 with respect to the $50,000, which he concedes was provided by Mrs. Richard. Samir denied meeting or knowing Sherrier or receiving any money from him. Jimmy testified to the same effect. Sherrier explains the Fancy testimony as a necessary exposition to avoid a charge of participation in an illegal plan to deal in Pakistani art. It should be noted that the claim of the $50,000 payment by Sherrier to the Fancys was made after Mrs. Richard requested some evidence that Sherrier had turned the moneys over to his solicitor to be held in escrow, which had been the initial understanding. Taking the current and past testimony into consideration as well as the facts and circumstances then existing as established during the trial, the court finds that Sherrier's testimony with respect to the $50,000 was false, and infers in the absence of any credible evidence to the contrary that he converted it to his own purposes in London.

A motion to vacate a judgment on grounds of perjured testimony raises important questions of the integrity of the judicial process.

> When a final judgment is attacked on grounds that it was procured by false testimony, the court must balance competing concerns for the fairness and integrity of judicial determinations, on the one hand, and the policy favoring finality in litigation on the other. In cases where the motion has been brought within one year of judgment as required by Rule 60(b)(3), the better course is to resolve this conflict in favor of assuring the fairness and integrity of judgments, at least to the extent of requiring a hearing when an adequate threshold showing of false testimony by a party witness has been made.

TAS International Travel Service, Inc. v. Pan American World Airways, Inc., 96 F.R.D. 205, 208 (S.D.N.Y. 1982). One court has gone so far as to state that if a judgment has even in part been obtained through the use of perjured testimony, it is "clearly the duty of the district court to set aside the judgment, because poison ha[s] permeated the fountain of justice." *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, 147 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

Sherrier's false testimony regarding the $50,000 requires amendment of the May 6 judgment. The false testimony does not affect the resolution of the principal issues presented, nor the valuations of the Standing and Seated Buddhas only the accounting of the funds expended. Therefore, the court views the depositions of the Fancys as new evidence requiring a modification of the judgment.

The court infers from the evidence now available that the purchase price of the Standing and Seated Buddhas should be reduced by $50,000, the amount which now stands unaccounted for in Sherrier's control in London in the spring of 1979 according to the Fancy's testimony. Sherrier's claim that the Fancy

testimony is false and a cover-up to avoid charges in Pakistan of illegal trafficking in art objects fails to carry the day. The payment in London and return of funds in Pakistan would not evidence such an illegal transaction and no basis for a charge of currency violations has been set forth. In the absence of any further corroboration, Sherrier has failed to meet his burden of proving the payment to Siddik of that particular amount, and indeed it may now be fairly concluded that the money never left England.

While it might be argued by Sherrier that no modification of the judgment on the basis of newly discovered evidence is appropriate without a hearing, *see Phelan v. Middle States Oil Corp.*, 210 F.2d 360, 366-67 (2d Cir. 1954); *cf. Federal Deposit Insurance Corp. v. Alker*, 234 F.2d 113, 117 (3d Cir. 1956), in this particular circumstance a hearing is not warranted. The court has observed Sherrier and has already concluded that certain of his testimony was not to be credited. Upon reading the depositions of the Fancys, who are beyond the court's subpoena power, the court has found them believable. To repeat a swearing contest in a direct conflict of testimony seems to be a useless exercise and expense. Accordingly and as described below, after further submissions and, if necessary, a hearing, the judgment will be amended.

If a modification, then why not a new trial under Fed.R.Civ.P. 59? According to Mrs. Richard, the falsity of Sherrier's testimony with respect to the $50,000 entitles her to a retrial and further discovery in aid of the retrial, or, alternatively, further discovery in support of her application for a new trial and a reference to the United States Attorney as a consequence of the alleged fraud on the court. The resolution of these applications turns on the materiality of the assumed false testimony, *see United States v. Walus*, 616 F.2d 283 (7th Cir. 1980), and requires examination of some of the trial findings. As was stated in the initial findings, "The task is even more difficult because the testimony of each [Sherrier and Mrs. Richard] on the crucial issues of intent, control, and profit and loss sharing, was in direct conflict, and neither Bernice nor Julian was

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completely credible during the trial." However, it may be that Sherrier had additional evidence, not yet produced, or wishes to rebut in person the testimony of the Fancys. In that event and upon the submission of his affidavit to that effect within twenty-one (21) days a hearing will be conducted.

This action was filed on June 8, 1982 and tried, after expedited discovery, from October 13 to 27, 1982. There were no specific discovery requests pending at the time of trial, but Mrs. Richard, opposing the request for injunctive relief, sought additional time for discovery before trial, which request was denied. Now, of course, additional discovery has been had, and the outcome has been unfavorable to Sherrier.

Mrs. Richard has not suggested that any additional evidence could be adduced with respect to the relationship between herself and Sherrier. Both have testified in detail, the surrounding circumstances and corroborating evidence were reviewed, and the conflicts have been resolved. There is no suggestion that any additional evidence is available as to the understanding between the principals.

What is suggested is that further evidence as to valuation and the circumstances of the purchases in Pakistan will so damage Sherrier's credibility that the entire foundation of the court's prior findings will crumble. However, the credible portions of Mrs. Richard's testimony, as well as that of Dara Zargar and the Peter Paone, and the documented flow of money and objects are sufficient to support the prior findings as to the formation of the relationship of trust, and the requirement of court action to dissolve the relationship and to require an accounting.

The only significant additional evidence that is sought relates to witnesses in Pakistan which would concern the acquisition of the objects and conceivably their selling prices. The value of the speculation concerning such evidence must be balanced against the need to terminate this costly and bitter litigation, and to require both parties to accept or to challenge, in whatever

fashion is appropriate, the court's determinations. At this moment, the proposed new evidence to be adduced upon a retrial does not rise to the level of materiality to require a new trial, and an amendment of the judgment based on the new evidence is the preferred course.

However, it might well be that further discovery will alter the present conclusions as to cost of the objects acquired, or indeed the court's present conclusions with respect to any possible fraud committed on the court. To that end Mrs. Richard's request for the issuance of letters rogatory under Rule 28(b), Fed.R.Civ.P. will be granted, though such action will not affect the finality of the judgment shortly to be modified. Any disputes concerning such discovery will be determined by this court, pursuant to Rule 27(b), Fed.R.Civ.P., even in the event an appeal is pending. If additional evidence is indeed forthcoming—for example, should Siddik be located—Mrs. Richard can again seek relief under Rules 59 and 60, Fed.R.Civ.P. While Mrs. Richard's application is not a customary one, the action itself certainly has its unusual characteristics. To permit a deposition for this purpose would seem to be preferable to the alternative, an independent action to set aside this judgment, a course which would appear to be open to Mrs. Richard under Fed.R.Civ.P. 60(b). *See generally* J. Moore, 7 *Moore's Federal Practice* § *60.36.*

Mrs. Richard also seeks discovery with respect to an Afghan silver collection allegedly brought into the country illegally by Sherrier in 1980 and purchased out of the funds provided by Mrs. Richard for the purchase of the Princely and Elongated Buddhas. However, the offering of such a collection in New York in 1982 on behalf of Sherrier, which is the substance of the proffered testimony, will not establish the source of funds, if any, used to purchase the collection, or indeed whether the collection was so purchased. The benefit of such evidence is too tangential to justify further discovery. The request to take the deposition of Jerome Eisenberg is therefore denied.

As to Sherrier's requests for relief, no hearing will be held on the requested contempt of the court's order of

confidentiality concerning Mrs. Richard's identification of the Fancy family. The provision was sought by Sherrier's counsel, in complete good faith, in order to protect the Fancys, since all concerned recognized the possible illegality of any involvement in the described transactions. However, given the change of Mrs. Richard's counsel, the professed purpose of the order, and the evident attitude of the Fancys, Mrs. Richard is excused from her failure to make an application for relief from the order of confidentiality, which relief would unquestionably have been granted, give the Fancys' expressed views.

As to Sherrier's request for counsel fees, although Mrs. Richard has not observed the appropriate procedures, her conduct has not been so egregiously improper as to occasion imposition of counsel fees incurred by Sherrier since the entry of judgment. Mrs. Richard has demonstrated a dogged determination to litigate and to seek retribution for the wrongs she claims to have suffered, even in the face of claims for unpaid legal fees by prior counsel. While Sherrier may well challenge her motive or her judgment, her actions have not yet risen to the level of bad faith requiring her to assume Sherrier's legal fees.

As to the relief from the judgment sought by Sherrier it is evident that the initial judgment has not been effective to resolve the dispute between the parties, whose interests remain entangled with Sherrier unable to transfer the Buddhas to which he was held to be entitled. Further, of course, the judgment of May 6 must be amended in view of the findings recited above with respect to the $50,000 deposit.

Since Sherrier has to date been unable to pay the amounts required by the judgment, those amounts may be satisfied by a transfer to Mrs. Richard of either or both of the Buddhas awarded to Sherrier, for which he would receive a credit at the market value previously determined. Upon five days' notice to Mrs. Richard or her attorney, the Princely, Elongated and Fasting Buddhas may be transferred to a location in New York City to be held in escrow by counsel for the plaintiff, subject to the exclusive control of Sherrier and his attorney for sale or

further disposition. Sherrier will provide Mrs. Richard with ten days' notice of any proposed sale or transfer, identifying the parties and the terms of such sale. The proceeds of any such sale shall be held in New York in escrow by counsel for the plaintiff until the amended judgment shall be satisfied. The Buddhas, or the proceeds of any sale of the Buddhas, shall remain in New York subject to the terms of an amended judgment to be entered upon this opinion until such amended judgment is satisfied.

The parties will serve their proposed amended judgments and any supporting memoranda or affidavits within ten (10) days of the date hereof, and their answering papers, if any, within five (5) days thereafter. A hearing will be held on the form of the amended judgment on Friday, May 18, 1984 at 9:30 a.m. If Sherrier should wish to present additional witnesses, documents or other new evidence, to be detailed by affidavit, such hearing will be held at the same time.

Finally, as to the dispute between Mrs. Richard and her former attorneys, any amendments to the reply to the petition to assert an attorney's lien will be filed within twenty (20) days hereof or at such other time as counsel may agree upon.

IT IS SO ORDERED.

DATED: New York, N.Y.
April 27, 1984

ROBERT W. SWEET
U.S.D.J.